

No. PD-1184-16

In the
TEXAS COURT OF CRIMINAL APPEALS
at Austin

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No. 01-15-00132-CR

In the
First District Court of Appeals
at Houston

RICHARD CHARLES OWINGS, Jr.
Appellant

VS.

THE STATE OF TEXAS
Appellee

APPELLANT'S REPLY BRIEF
ON DISCRETIONARY REVIEW

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ORAL ARGUMENT NOT PERMITTED

IDENTIFICATION OF THE PARTIES

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STATEMENT OF THE CASE

Appellant was indicted for the felony offense of aggravated sexual assault of a child, enhanced with one prior felony conviction. (CR 10, 200-201, 207; RR-V3 10-11)¹. Appellant pled not guilty and proceeded to trial. (CR 200-201, 208; RR-V3 10-11). The jury found Appellant guilty, and sentenced him to serve 30 years in prison. (CR 193, 199-201, 208; RR-V5 89-91; RR-V6 48-49). Appellant filed timely written notice of appeal of his conviction and sentence. (CR 200-201, 203-204, 208-209). The First Court of Appeals reversed Appellant's conviction and remanded his case to the trial court for a new trial, finding that the trial court's failure to require the State to elect which specific instance of sexual assault it relied upon for conviction constituted harmful constitutional error. *Owings v. State*, No. 01-15-00132-CR, 2016 WL 4536449 (Tex. App. - Houston [1st Dist.] 2016, *pet. granted*).

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to **Tex. R. App. P. 75.1**, this Honorable Court of Criminal Appeals has notified the parties that oral argument will not be permitted.

1. - CR = Clerk's Record (Volume I); RR-V1 – RR-V7 = Reporter's Record (Volumes 1 through 7).

ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals err in finding that the trial court committed harmful constitutional error when it failed to require the State to elect which specific incident of sexual assault from among the several shown by the evidence at trial the State was relying upon for conviction?

STATEMENT OF FACTS

Appellant was indicted for the offense of aggravated sexual assault of a child, specifically for causing the sexual organ of the complainant to contact the sexual organ of Appellant on or about January 1, 2010. (CR 10). At trial, the State offered evidence detailing four separate incidents of sexual assault alleged to have been committed by Appellant against the same complainant on four different dates over a period of several years ranging from 2009 to 2011, at three different locations, and by multiple means beyond that alleged in the indictment, including allegations of actual penetration of the complainant's sexual organ and penetration of the complainant's mouth by Appellant's sexual organ. (RR-V3 169-172, 212-225; RR-V4 8, 13-16, 18-51, 60, 70-72, 76-77).

After the State rested, Appellant's trial attorney requested that the State make an election as to which of the multiple alleged incidents of sexual assault the were going to rely upon for conviction, stating "we have had multiple offenses given to us in testimony, and we have multiple dates for

occasions for them, and we believe that ... we have the right to ask the State to elect which on of the multiple occasions it's going to rely on.” (RR-V4 117; RR-V5 5-6).

The trial court responded that it would “give the jury a limiting instruction” but did not require the State to make an election as requested by Appellant’s trial attorney. (RR-V5 5-6).

Appellant then testified and denied all of the alleged incidents of sexual assault of the complainant, and stated that it was his belief that the complainant had been manipulated into making the false allegations by her grandmother, Appellant’s ex-wife. (RR-V5 19-22, 31-35, 38-40, 44).

SUMMARY OF THE ARGUMENT

The Court of Appeals was correct in finding that the trial court committed harmful constitutional error in violation of established precedent when it failed to require the State to make an election of the specific incident of sexual assault upon which it relied for conviction where there were multiple incidents shown by the evidence at trial and the jury instructions in the trial court’s charge did not minimize the risk that the jury impermissibly convicted Appellant not because the State proved any specific incident beyond a reasonable doubt but instead because all of the alleged incidents taken together convinced the jury of Appellant’s guilt, nor did the jury instructions ensure that the jury unanimously agreed beyond a reasonable

doubt that Appellant committed a particular act of sexual assault against the complainant which constituted the offense charged in the indictment, and further, the trial court's error resulted in Appellant not receiving adequate notice of which specific act the State would rely upon in order to present his defense. *See O'Neal v. State*, 746 S.W.2d 769 (Tex. Crim. App. 1988); *Phillips v. State*, 193 S.W.3d 904 (Tex. Crim. App. 2006); **Tex. R. App. P. 44.2(a)**.

REPLY TO STATE'S SECOND GROUND FOR REVIEW

THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE TRIAL COURT COMMITTED HARMFUL CONSTITUTIONAL ERROR WHEN IT FAILED TO REQUIRE THE STATE TO MAKE AN ELECTION OF THE SPECIFIC INCIDENT OF SEXUAL ASSAULT UPON WHICH IT RELIED FOR CONVICTION.

RELEVANT AUTHORITIES, FACTS & ARGUMENT

The general rule is that whenever one act of intercourse is alleged in the indictment and more than one act of intercourse is shown by the State's evidence at trial, the defendant is entitled to have the trial court order the State to elect the specific act it is relying upon for conviction. *O'Neal*, 746 S.W.2d at 771-772; *see Phillips*, 193 S.W.3d at 909-914 (*reaffirming O'Neal*). There are four reasons for this rule: (1) to protect the accused from the introduction of extraneous offenses; (2) to minimize the risk that the jury might choose to convict, not because one or more crimes were proved beyond a reasonable doubt, but because all of them together convinced the

jury that the defendant was guilty; (3) to ensure a unanimous verdict, that is, all of the jurors agreeing that one specific incident, which constituted the offense charged in the indictment, occurred; and (4) to give the defendant notice of the particular offense that the State intends to rely upon for prosecution and afford the defendant a proper opportunity to defend. *Phillips*, 193 S.W.3d at 909-910. The rule is clear that once the State rests its case in chief, in the face of a timely request by the defendant, the trial court *must* order the State to make an election, and failure to do so constitutes constitutional error by the trial court. *Phillips*, 193 S.W.3d at 914. A limiting instruction to the jury regarding the extraneous offenses does not restrict the defendant's right to have the State make the necessary election – the requirement for the election is well-settled law and clearly distinct from a limiting instruction. *Phillips*, 193 S.W.3d at 911, *citing O'Neal*, 746 S.W.2d 769; *Crawford v. State*, 696 S.W.2d 903 (Tex. Crim. App. 1985). The trial court's failure to require the State to elect the specific act upon which it intends to rely for a conviction upon a timely request by a defendant constitutes constitutional error, and in such cases, the appellate court must reverse a judgment of conviction unless it finds beyond a reasonable doubt that the error did not contribute to the conviction. *Phillips*, 193 S.W.3d at 914; **Tex. R. App. P. 44.2(a)**.

In Appellant's case, the majority of the Court of Appeals held that the trial court committed harmful constitutional error when it denied Appellant's request that the State be required to elect which of the multiple instances of sexual assault that it presented at trial would be relied upon for conviction, and reversed and remanded the case to the trial court for a new trial as required. **Owings**, 2016 WL 4536449 at 20-34. Specifically, the Court of Appeals found that the trial court's failure to require the State to make an election failed to minimize the risk that the jury convicted Appellant not because the State proved one or more of the alleged incidents beyond a reasonable doubt but because all of the incidents taken together convinced the jury of Appellant's guilt. **Owings**, 2016 WL 4536449 at 26. Further, the Court of Appeals found the the trial court's failure to require the State to make an election failed to ensure that the jury unanimously agreed beyond a reasonable doubt as to which particular act of sexual assault for which Appellant was convicted. **Owings**, 2016 WL 4536449 at 31. The Court of Appeals found that the jury could have convicted Appellant on any or all of the four instances of sexual assault for which evidence was presented, with some of the jurors relying on one specific instance of sexual assault and other jurors relying on different instances of sexual assault in violation of the jury unanimity requirement. **Owings**, 2016 WL 4536449 at 33. Finally, the Court of Appeals found that the trial court's failure to require the State to

make an election made it so unclear which incident of sexual assault the State was relying upon for a conviction that Appellant did not have adequate notice to properly prepare his defense. *Owings*, 2016 WL 4536449 at 33. In summary then, the Court of Appeals found that the trial court's failure to require the State to make an election in Appellant's case was harmful to Appellant in respect to three of the four purposes behind the election rule. *See Phillips*, 193 S.W.3d at 909-910.

Court of Appeals Justice Bland in her dissenting opinion agreed that the trial court committed constitutional error in Appellant's case, but argued that on application to the specific facts of Appellant's case, the error was constitutionally harmless because it did not in her opinion contribute beyond a reasonable doubt to Appellant's conviction. *See Owings*, 2016 WL 4536449, dissenting opinion at 1-2. Likewise, the State does not contend here that the Court of Appeals was wrong in finding that the trial court committed constitutional error, but rather argues that the majority of the Court of Appeals was incorrect in their conclusion that the error was constitutionally harmful.

Turning then to the constitutional harm analysis conducted by the Court of Appeals, the Court of Appeals correctly noted that the complainant testified to four separate and distinct instances of sexual assault, all four of which involved the charged conduct of appellant's sexual organ contacting

the complainant's sexual organ, as well as the additional conduct of Appellant forcing the complainant to perform oral sex on him in three of the instances. The Court of Appeals found that this raised the risk that the jury might choose to convict Appellant not because one or more of the incidents alleged were actually proved beyond a reasonable doubt, but instead because all four of the incidents taken together convinced the jury to find Appellant guilty. The Court of Appeals specifically distinguished the facts in Appellant's case from the facts in the **Dixon** case cited by the State, noting that unlike Appellant's case, **Dixon** involved a child complainant who "articulated one sequence of events and merely answered that his sequence happened one hundred times", as opposed to a complainant who testified "about a number of varied incidents with differing details that might have incrementally added up to the idea that the defendant must have done something to provoke the plethora of stories about his activities". **Owings**, 2016 WL 4536449 at 25, *citing Dixon v. State*, 201 S.W.3d 731, 734-735 (Tex. Crim. App. 2006). Thus, the Court's constitutional harm analysis correctly found that the second of the four purposes for requiring the State to make an election was not met.

The Court of Appeals also noted that, since the complainant had provided detailed testimony regarding four specific, separate instances in which Appellant's sexual organ contacted her sexual organ as charged in the

indictment, the sexual offense alleged in the indictment had been “described in detail more than once; yet, it was completely unclear to the jury which specific act the State would rely upon for conviction.” *Owings*, 2016 WL 4536449 at 29, citing *Phillips*, 130 S.W.3d at 353-354; see also *Farr v. State*, 140 S.W.3d. 895, 900 (Tex. App. - Houston [14th Dist.] 2004). The Court of Appeals found that the jury charge’s general unanimity instruction was not sufficient in a case like Appellant’s, where the complainant testified to multiple detailed instances of conduct fitting the allegations in the indictment, to ensure that the jury unanimously agreed that Appellant had committed the same particular offense. *Owings*, 2016 WL 4536449 at 29, citing *Ngo v. State*, 175 S.W.3d 738, 745 (Tex.Crim. App. 2005). Thus, the Court’s constitutional harm analysis correctly found that the third of the four purposes for requiring the State to make an election was not met.

The Court of Appeals went on to note that since the complainant testified to four distinct incidents that occurred at different times, different locations, and involved different sexual acts, and that in presenting its case the State did not emphasize one incident significantly more than any of the other incidents, in the absence of an election, it was simply not clear from the testimony which specific incident the State would rely upon for conviction, and that Appellant therefore did not have adequate notice of the particular offense upon which the State intended to rely. *Owings*, 2016 WL

4536449 at 32-33, *citing Phillips*, 130 S.W.3d at 353-354. Thus, the Court’s constitutional harm analysis correctly found that the last of the four purposes for requiring the State to make an election was not met.

In support of its argument that the error in Appellant’s case should be found to be harmless, the State cites several cases, including *Reza v. State*, 339 S.W.3d 706 (Tex. App. - Fort Worth 2011, *pet. ref’d*), *Cosio v. State*, 353 S.W.3d 766 (Tex. Crim. App. 2011), and *Isenhower v. State*, 261 S.W. 3d 168 (Tex. App. - Houston [14th Dist.] 2008, *no pet.*). It is important to note that all three of these cases involve situations where, unlike in Appellant’s case, the trial court in fact properly required the State to make an election, but then failed to inform the jury in the jury charge of that election and of the jury’s corresponding duty to consider only the elected act in deciding guilt and to convict only if all jurors unanimously agree beyond a reasonable doubt the the defendant committed the specifically elected act. *See Owings*, 2016 WL 4536449 at 21. As the Court of Appeals discussed in its opinion herein, these cases are quite distinct from cases like Appellant’s, and on appeal, even though the four *Phillips* purposes are considered, these cases are judged using a much lower standard of harm analysis - either “some harm” or “egregious harm” depending on whether or not the defendant objected to the error at trial, as opposed to the stricter constitutional harm standard set out in *Phillips* for cases like Appellant’s

where the trial court wholly failed to require an election. *Owings*, 2016 WL 4536449 at 21-24; *see also Phillips*, 193 S.W.3d at 914; **Tex. R. App. P. 44.2(a)**.

Given that the record of the trial court proceedings supports the findings by the Court of Appeals that three of the four purposes of the requirement for an election under the *Phillips* line of cases were not met in Appellant's case, it is clear that the majority of the Court of Appeals applied the proper standard and was correct in concluding that it cannot be said *beyond a reasonable doubt* that the trial court's error in failing to require the State to make an election did not contribute to Appellant's conviction, making the trial court's error constitutionally harmful to Appellant. For this reason, Appellant's case must be reversed and remanded for a new trial.

CONCLUSION AND PRAYER

For the foregoing reasons, Appellant prays that this Honorable Court of Criminal Appeals will deny the State's sole ground of review and affirm the judgment of the First Court of Appeals reversing Appellant's conviction and remanding his case to to the trial court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served the foregoing Appellant's Reply Brief on the following parties via electronic service on April 7, 2017:

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CERTIFICATE OF COMPLIANCE

Pursuant to **Tex. R. App. P. 9.4(i)(3)**, I certify that the computer program used to generate this document indicates that it contains a total of **3,385** words.

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